

DOCKET FILE COPY ORIGINAL

ORIGINAL

**BARAFF, KOERNER, OLENDER & HOCHBERG, P.C.**

ATTORNEYS AT LAW

5335 WISCONSIN AVENUE, N.W., SUITE 300  
WASHINGTON, D.C. 20015-2003

(202) 686-3200

B. JAY BARAFF  
ROBERT L. OLENDER  
JAMES A. KOERNER  
PHILIP R. HOCHBERG  
AARON P. SHAINIS  
LEE J. FELTZMAN  
MARK J. PALCHICK  
JAMES E. MEYERS

April 12, 1993

RECEIVED  
APR 12 1993  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
OF COUNSEL  
ROBERT BENNETT LUBIC  
FAX (202) 686-5282

Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N. W.  
Washington, D. C. 20554

RE: National Hockey League  
PP Docket No. 93-21

Dear Ms. Searcy:

On behalf of my client, the National Hockey League, I hereby submit an original and nine (9) copies of Reply Comments of the National Hockey League in PP Docket No. 93-21.

RECEIVED

Before the  
Federal Communications Commission  
Washington, D.C. 20554

APR 12 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Section 26 of the )  
Cable Television Consumer Protection )  
and Competition Act of 1992 )

PP Docket No. 93-21

Inquiry into Sports Programming )  
Migration )

**REPLY COMMENTS OF  
NATIONAL HOCKEY LEAGUE**

COMES NOW the National Hockey League (sometimes "NHL" or "League") and files these Reply Comments in response to the Commission's Notice of Inquiry, Plans and Policy Docket No. 93-21 ("the Notice"), dealing with "Sports Migration" issues pursuant to Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act").<sup>1</sup>

Summary

Based on the comments filed by both the NHL and other parties, the record rather plainly demonstrates that there is no meaningful problem of sports programming migration.<sup>2</sup> Only one commentator -- the Association of Independent Television Stations ("INTV") -- claimed that there was a serious problem of migration of sports programming.

---

<sup>1</sup>Pub. Law 102-385, 102 Stat. 1460 (1992).

<sup>2</sup>Since the filing of Comments in PP Docket No. 93-21, the League has revised its alignment and playoff format. See Appendix B.

INTV stands alone in this view. None of the four national broadcast networks identified a problem of programming migration; indeed, two thought it to be a "problem" of such limited dimensions that they did not even file comments in response to the Commission's Notice of Inquiry. The two networks that did comment, ABC and NBC, both flatly stated not only that there was no problem with migration of sports programming, but that the growth of sports programming on cable television had increased the amount of televised sports available to consumers and had not come at the expense of programming carried on broadcast television. Even the NAB was reluctant to take a position in support of regulatory action.

As we show below, INTV's position is ill-founded, both generally and with respect to the National Hockey League and offers no basis for any legislative or regulatory action that would limit the rights of either buyers or sellers of sports programming.

In its comments, the NHL makes clear its desire to use all forms of distribution, including broadcast television, in ways most benefitting teams, players, and fans in the long run. Broad television distribution simply makes good business sense both as a source of income and a source of promotion for the team or league locally or nationally.

To the extent "migration" of NHL telecasts has occurred, it has been primarily the result of marketplace forces, especially

broadcaster decisions.<sup>3</sup> The NHL seeks to televise its games on a national broadcast network, but has been unable to secure a network contract since 1976 -- and no broadcaster has suggested this was for any reason other than an assessment by the networks of the attractiveness of NHL telecasts in the entertainment market.

Reply of NHL to Other Comments

Comments of Broadcast Parties.

Several broadcast parties filed comments, including Capital Cities-ABC, the National Association of Broadcasters, NBC, and

coverage from free, over-the-air  
broadcast media.<sup>6</sup>

NBC also commented on the problems inherent in drawing conclusions from isolated examples,<sup>7</sup> an observation that is particularly well taken with respect to INTV's Comments. INTV bases its recommendations almost exclusively on limited anecdotes with no effort at quantifying "migration" in any global sense.

Even the National Association of Broadcasters recognized the "complex economic, contractual, public policy and even constitutional issues" associated with the Commission's inquiry.<sup>8</sup> The NAB expressed some concern with the "movement of local sports events"<sup>9</sup> based on a letter to the Wall Street Journal<sup>10</sup> (which contains demonstrable factual misstatements) and a proposed amendment to the Cable Act that was rejected in Committee. The NAB recognized that economic considerations operating at the broadcaster-to-broadcaster level will result in some local stations having sports programming and others being without such programming.<sup>11</sup> Thus, the "severe adverse economic

---

<sup>6</sup>Id. at 2.

<sup>7</sup>Id. at 3.

<sup>8</sup>NAB Comments at 5.

<sup>9</sup>Id. at 2.

<sup>10</sup>Citing letter from Reps. Sikorski, McMillen and Shays. The factual inaccuracy in the letter's description of NHL telecasts is discussed at pp. 7-8, *infra*.

<sup>11</sup>NAB Comments at 3.

impact" cited by the NAB may be entirely unrelated to cable television.

Of the thirty-seven (37) filing parties, only the Association of Independent Television Stations saw any major problem. Urging on the Commission that economic analyses are not appropriate, INTV stated that Congress "intended" to keep sports programs on over-the-air television<sup>12</sup> and stated, somewhat surprisingly, that the "most significant problem confronting local television stations today is the migration of regular season games."<sup>13</sup>

INTV begins by distorting the Congressional mandate. The intent of Congress in enacting Section 26 of the Cable Act was clear: The FCC is to conduct a study of sports "migration." The requirement admits of no finding one way or another and cannot be contorted to read otherwise. Indeed, Congress rejected other, more onerous provisions, which would have directly regulated sports programming and, if enacted, might have lent support to INTV's position. INTV ignores, for example, both that the Senate bill was silent as to sports programming -- indeed it did not even seek a study -- and the Congressional rejection of what was Section 623(d) of the House-passed measure. That section would have, for all intents and purposes, denied sports teams or leagues the opportunity to put final round playoff games on pay-per-view. This was

---

<sup>12</sup>INTV Comments at 4.

<sup>13</sup>Id. at 5. (Emphasis added.)

specifically rejected in Conference.<sup>14</sup> As passed, the Cable Act sought one thing and one thing only: an FCC study.

Much of what INTV calls "migration" is simply the result of arm's-length bargaining in the marketplace, as was recognized by many other commentators, including ABC, NBC and the NAB. INTV subjects this activity to a biased analytical framework and, not surprisingly, generates a set of self-serving conclusions. The NHL concurs with the position expressed by ABC and NBC that the public interest has not been disserved by the current mix of broadcast and cable policies as they relate to sports programming.

As to the NHL specifically, INTV claimed that it had "every reason to believe the number of NHL games appearing on local television stations has declined in recent years."<sup>15</sup> It further contends that the "number of hockey games leaving off-air television appears to be accelerating."<sup>16</sup>

INTV devoted the bulk of its NHL-related comments to the Minnesota North Stars. Its filing states:

Perhaps the egregious example of sports siphoning occurred during the 1990/1991 season with the then [sic] Minnesota North Stars. KMSP-TV had carried many of the North Stars' regular season away games. However when the North Stars made the Stanley Cup Play-

---

<sup>14</sup>Congressional Record, September 14, 1992, at H8324.

<sup>15</sup>INTV Comments at 25.

<sup>16</sup>Id. at 26.

offs, the games shifted to pay-per-view.<sup>17</sup>

INTV further contends that the number of NHL games appearing on television has declined. It ignores the facts, however, preferring to focus on a few isolated examples. In fact, the opposite is true if measured in the markets where teams have been able to get television contracts. Other than in the New York market and Hartford (where the flagship station for the Hartford Whalers went bankrupt and off-the-air), the number of regular season over-the-air telecasts in 1992-93 exceeds that of 1981-82. See Appendix A.

The discussion of the experience of the Minnesota North Stars is similarly unfounded. For example, INTV states that the North Stars' playoff games in 1991 were "shifted to pay-per-view."<sup>18</sup> This is simply false. KMSP-TV, the North Stars' flagship station in the 1990-91 season, carried only North Stars' away games during the regular season; no regular season home games were shown on conventional over-the-air television. An identical package of playoff games was available on over-the-air television: KMSP-TV carried only (and all) the team's away playoff games. As a result of the North Stars' success in the playoffs, KMSP-TV enjoyed a "financial windfall."<sup>19</sup> As one

---

<sup>17</sup>Id. at 26.

<sup>18</sup>Ibid.

<sup>19</sup>St. Paul Pioneer Press, May 10, 1991, at \_\_\_\_.



local newspaper said, "No one could be happier at this time [May 1991] than the folks at KMSP-TV (Channel 9)." <sup>20</sup>

During the course of the playoffs, negotiations between KMSP-TV and the North Stars to carry an additional package of home playoff games did not prove fruitful. The parties, bargaining at arm's-length, were not able to reach a conclusion which would have put the home playoff games on conventional, over-the-air television for the first time. Likewise the North Stars were not able to sell the games on reasonable terms to a basic cable network. Given the inability to reach a real-life marketplace accord with broadcasters or a basic cable package, the North Stars pay-per-view package actually expanded the number of games available by adding an additional set of games - the home playoff games -- to the existing package.

For INTV to say that this represents "the most egregious example of sports siphoning" stands common sense, common logic, and common language -- to say nothing of the truth -- on its ear.

Based on these limited and mischaracterized "facts," INTV suggests that the Commission should reinstate sports siphoning rules. This ephemeral proposal should be rejected out of hand. Not only would such rules be utterly without support in the record, they would -- as even the NAB acknowledges -- raise serious economic and constitutional questions.

---

<sup>20</sup>Ibid.

Comments with Respect to the Sports Broadcasting Act of 1961.

The NHL endorses the comments of ABC, the National Basketball Association, and the National Football League regarding the 1961 Act. ABC stated that the Act "generally promote(s) competition and further(s) the public interest" and that the statute has benefitted both buyers and sellers.<sup>21</sup> The NHL submits that no changes are necessary in the Act.<sup>22</sup>

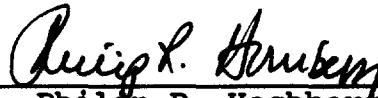
Comments of New York City Department of Telecommunications and Energy.

New York City suggested that the Commission should establish a Sports Programming Advisory Committee to "analyze the causes and consequences of migration trends and to formulate recommendations."<sup>23</sup> That is, of course, precisely the purpose of the current inquiry. Establishing an Advisory Committee

has occurred, it has been caused by necessity, based on a large number of market forces, including, in particular, choices made by broadcasters. None of the Comments received by the Commission can lead to any other conclusion. The League reaffirms its desire to serve the interests of the viewing public who wish to see hockey.

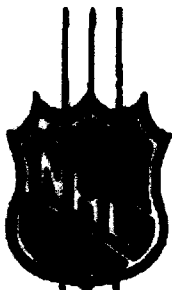
Respectfully submitted,

NATIONAL HOCKEY LEAGUE



Philip R. Hochberg  
BARAFF, KOERNER, OLENDER  
& HOCHBERG, P. C.  
5335 Wisconsin Avenue. N.W.

## Appendix A



# NHL Communications Group

FOR IMMEDIATE RELEASE

MARCH 31, 1993

## NHL ADOPTS NEW ALIGNMENT, SCHEDULING AND STANLEY CUP PLAYOFF FORMAT FOR NEXT SEASON

NEW YORK -- The National Hockey League will have a new look to its regular-season schedule, Stanley Cup playoff format and conference and divisional alignment when its 28 teams begin play in the 1993-94 season, Commissioner Gary Bettman announced today.

Under the plan, unanimously approved by the Board of Governors, the League adopted new names for the conferences, Eastern and Western, and divisions, Northeast, Atlantic, Central and Pacific, which reflect the geographic alignment of the NHL; adopted a regular-season schedule which maintains traditional divisional and geographic rivalries, while also providing for a more balanced distribution of games; and moved to a playoff system based on conference play, with the top eight clubs in each conference qualifying for the Stanley Cup playoffs.

"These changes will best serve the interests of our teams, players, fans and the media," said Bettman. "The League has adopted a plan that will enhance rivalries both within and outside divisional play.

"The new system better rewards teams for their performance in the regular-season by moving to a playoff system based on conference play. As well, this alignment provides hockey fans with more variety in games involving their favorite teams."

### Alignment for 1993-94 season

#### WESTERN CONFERENCE

##### PACIFIC

Anaheim  
Calgary  
Edmonton  
Los Angeles  
San Jose  
Vancouver

##### CENTRAL

Chicago  
Dallas  
Detroit  
St. Louis  
Toronto  
Winnipeg

#### EASTERN CONFERENCE

##### NORTHEAST

Boston  
Buffalo  
Hartford  
Montreal  
Ottawa  
Pittsburgh  
Quebec

##### ATLANTIC

New Jersey  
NY Islanders  
NY Rangers  
Philadelphia  
South Florida  
Tampa Bay  
Washington

.../2



While returning to East-West designations for the conferences, the League will continue to honor the memories of the great builders of the game - Charles F. Adams (Northeast), Lester Patrick (Atlantic), James Norris (Central) and Conn Smythe (Pacific) - with Cups to the regular-season champions of each division in their names. The Prince of Wales Trophy will go to the Eastern Conference playoff champions and the Clarence Campbell Bowl will be awarded to the Western Conference playoff champions.

In the new alignment format there are three changes from the 1992-93 groupings: Winnipeg moves to the Central Division from the Pacific; Tampa Bay moves to the Atlantic Division from the Central; and Pittsburgh moves to the Northeast Division from the Atlantic.

The NHL's two newest member clubs - Anaheim and South Florida - join the Pacific and Atlantic divisions, respectively.

#### Schedule Breakdown

The NHL's 28 member clubs will each play a total of 82 games, broken down as follows:

**WESTERN CONFERENCE - clubs will play six**

### Playoff System

The League will move to a conference-based playoff system with the 1st place team in the regular-season competing against #8; #2 vs. #7; #3 vs. #6; and #4 vs. #5. The playoff matchups will be based on overall points achieved in the regular-season, with the four division regular-season champions being placed in the first and second place seeds in each conference and being assured of home-ice advantage in the first two playoff rounds.

All series will remain best-of-seven with home-ice rotating on a 2-2-1-1-1 basis, with the exception of matchups between Central and Pacific division teams which would be played on a 2-3-2 basis to reduce travel. In a 2-3-2 series, the team with the most points will have its choice as to whether to start the series at home or on the road.

The Eastern Conference champion will face the Western Conference champion in the Stanley Cup Final.

Attached is a breakdown of the schedule distribution of games by team for next season.